

NO. 22051

IN THE UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

TERRANCE I. POSTON, a citizen
of Alaska,

Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA,
HAWAIIAN ELECTRIC COMPANY, INC.,
an Hawaiian corporation, and
GEORGE OKANO ELECTRICAL SERVICE,
LTD., an Hawaiian corporation,

Defendants-Appellees.

FILED

SEP 6 1967

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BRIEF OF CROSS-APPELLANT

Of Counsel:

ANDERSON, WRENN & JENKS

RICHARD E. STIFEL
Bank of Hawaii Building
Honolulu, Hawaii

Attorney for Defendant
Cross-Appellant Hawaiian
Electric Company, Inc.

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EXPLANATION OF SYMBOLES AND REFERENCES

Whenever a reference is made to the Clerk's Certified Record on Appeal, it is shown as R.O.A.

Reference to the transcripts of proceedings and testimony are shown as Tr.

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JURISDICTION

This is an action for damages for personal injuries brought by the plaintiff, Terrance I. Poston. The action was filed on January 26, 1965, in the United States District Court for the District of Hawaii against the defendants The United States of America, Hawaiian Electric Company, Inc., a Hawaii corporation (hereinafter called Hawaiian Electric), and George Okano Electrical Service, Ltd., a Hawaii corporation (hereinafter called Okano) (R.O.A. 2-19). The plaintiff is a citizen of the State of Alaska (Tr. 139-40).

The amount in controversy exceeded the sum of \$10,000 exclusive of interest and costs. The United States District Court for the District of Hawaii had jurisdiction on the basis of diversity of citizenship (28 U.S.C.A. § 1332) and the Federal Tort Claims Act (28 U.S.C.A. §§ 1346(b), 2671, et seq.).

On March 25, 1965, Hawaiian Electric filed an answer to plaintiff's complaint and a cross-claim against United States. The cross-claim contained a prayer that if it be determined that Hawaiian Electric and either or both of the other defendants were joint tort-feasors,

APPENDIX

1. The first part of the appendix contains a list of the names of the persons who have been elected to the office of President of the United States since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
2. The second part of the appendix contains a list of the names of the persons who have been elected to the office of Vice President of the United States since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
3. The third part of the appendix contains a list of the names of the persons who have been elected to the office of Speaker of the House of Representatives since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
4. The fourth part of the appendix contains a list of the names of the persons who have been elected to the office of President of the Senate since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
5. The fifth part of the appendix contains a list of the names of the persons who have been elected to the office of Chief Justice of the United States since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
6. The sixth part of the appendix contains a list of the names of the persons who have been elected to the office of Associate Justice of the United States since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
7. The seventh part of the appendix contains a list of the names of the persons who have been elected to the office of Secretary of State since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
8. The eighth part of the appendix contains a list of the names of the persons who have been elected to the office of Secretary of the Navy since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
9. The ninth part of the appendix contains a list of the names of the persons who have been elected to the office of Secretary of the Treasury since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.
10. The tenth part of the appendix contains a list of the names of the persons who have been elected to the office of Secretary of the War since 1789. The names are given in alphabetical order, and the year of election is given in parentheses after each name.

that the relative degree of fault of each be determined and that Hawaiian Electric have judgment against the other joint tort-feasors for any excess it might pay over and above its pro rata share of such judgment (R.O.A. 25-30).

The action came on for trial before the court and a jury on January 11, 1967. At the close of plaintiff's case on January 17, 1967, all defendants made motions for directed verdicts (Tr. 799-802). On January 18, 1967, the court orally granted the motion of defendant Okano and denied the motions of United States and Hawaiian Electric (Tr. 872-75).

On January 20, 1967, at the close of defendants' case, Okano made a motion for a directed verdict on Hawaiian Electric's cross-claim and said motion was granted. Defendants Hawaiian Electric and United States moved for directed verdicts in respect to plaintiff's claims. The motion of Hawaiian Electric was granted while the motion of United States was denied (Tr. 1348-50, 1384).

The court then discharged the jury and, as trier of fact decided plaintiff's case against the United States

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on its merits, giving a decision in favor of the United States (Tr. 1389-90).

Motions for a new trial and for judgment notwithstanding the verdict were filed by the plaintiff on January 25, 1967, and were denied on the same day (Tr. 1484).

Plaintiff has appealed from the order filed January 19, 1967, directing a verdict for Okano and against plaintiff, and from the order filed January 25, 1967, directing a verdict for Hawaiian Electric and against plaintiff, and from the judgment filed January 25, 1967, dismissing plaintiff's action against the United States (R.O.A. 174-75).

This cross-appeal is from the order filed January 25, 1967, directing a verdict for defendant Okano and against Hawaiian Electric on Hawaiian Electric's cross-claim. Hawaiian Electric's notice of cross-appeal was filed on February 24, 1967 (R.O.A. 191). The United States Court of Appeals for the Ninth Circuit has jurisdiction by virtue of 28 U.S.C.A. 1291.

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STATEMENT OF THE CASE

On September 10, 1963, plaintiff, Terrance I. Poston, was employed by Reed & Martin International as a backhoe operator (Tr. 152). Reed & Martin International was the general contractor for the U.S. Navy for certain changes being made on the Navy's communications system at its Kunia facility on the Island of Oahu, State of Hawaii. Okano was a subcontractor on this job. On said day Mr. Poston was instructed by his employer to drive a backhoe to the Kunia facility and to change the depth and slope of an existing ditch (Tr. 153, 187). The ditch was located on land belonging to the United States. A portion of the ditch in question ran underneath two guy wires which supported two poles which in turn supported a double cross-arm to which two sets of high voltage electrical transmission lines were attached and also a platform upon which a metering transformer was located (Ex. G-7). One set of transmission lines belonged to Hawaiian Electric and ran from its distribution system to said cross-arm. The other set belonged to the United States and ran from said cross-arm to other parts of the Kunia facility. The guy wires, the poles, the cross-arm

THEORY OF THE EARTH

1. The Earth is a sphere of about 8000 miles in diameter.

2. The Earth is composed of a solid crust, a liquid mantle, and a solid core.

3. The crust is about 100 miles thick, and is composed of various rocks and minerals.

4. The mantle is about 2000 miles thick, and is composed of a liquid material.

5. The core is about 1000 miles in radius, and is composed of a solid material.

6. The Earth is surrounded by a thin layer of atmosphere.

7. The atmosphere is composed of various gases, and is about 100 miles thick.

8. The Earth is covered by a thin layer of water, which is about 1000 miles thick.

9. The water is composed of various salts, and is about 1000 miles thick.

10. The Earth is surrounded by a thin layer of magnetosphere.

11. The magnetosphere is composed of various magnetic fields, and is about 1000 miles thick.

12. The Earth is surrounded by a thin layer of ionosphere.

13. The ionosphere is composed of various ions, and is about 1000 miles thick.

14. The Earth is surrounded by a thin layer of thermosphere.

15. The thermosphere is composed of various thermal energy, and is about 1000 miles thick.

16. The Earth is surrounded by a thin layer of exosphere.

17. The exosphere is composed of various exothermic energy, and is about 1000 miles thick.

18. The Earth is surrounded by a thin layer of heliosphere.

19. The heliosphere is composed of various heliophilic energy, and is about 1000 miles thick.

20. The Earth is surrounded by a thin layer of magnetopause.

and the platform and certain wires running from the transmission lines to the metering transformer belonged to the United States (Tr. 1246-1247). The metering transformer and a meter mounted on one of said poles belonged to Hawaiian Electric (Tr. 1242-1243).

Mr. Poston believed that the digging operation would be more conveniently accomplished if one of the guy wires under which the ditch passed were removed from its anchor. According to Mr. Poston, he went to the foreman for George Okano Electrical Service, Ltd., which was a subcontractor of Reed & Martin International, and asked him, "If I take the guy wires loose, will the pole fall down?", to which the foreman replied, "No. Take it out." (Tr. 188-92). Sometime after starting to remove one of the guy wires Mr. Poston received severe electrical shock (Tr. 192-207).

QUESTIONS PRESENTED ON CROSS-APPEAL

This cross-appeal may be premature because the order filed January 25, 1967, directing that a verdict be entered for defendant Okano and against Hawaiian Electric in respect to the latter's cross-claim, may not have been



a final judgment. This is because, although the action presented more than one claim for relief, the court did not, as required by Rule 54(b) of the Federal Rules of Civil Procedure, make an express determination that there was no just reason for delay in entering judgment in respect to said cross-claim and did not expressly direct entry of judgment. Furthermore, when the court rendered its oral decision on January 18, 1967, in Okano's favor on the cross-claim it was possible that the question raised by the cross-claim would become moot, and when the court signed the order on January 25, 1967, on the cross-claim, the question had become moot because by then the court had directed verdict for Hawaiian Electric on the plaintiff's claims. See Thompson v. Trent Maritime Company, Ltd., 343 F.2d 200. However, Hawaiian Electric could not be absolutely certain that the order in respect to the cross-claim was not a final judgment and, therefore, was compelled to take this cross-appeal in order to avoid the risk of having a subsequent appeal dismissed as untimely.

Assuming that the appeal is not premature, the issue is whether the trial court erred in ordering that

a verdict be entered for defendant Okano and against defendant Hawaiian Electric in respect to the latter's cross-claim against Okano for contribution.

SPECIFICATION OF ERROR

The trial court erred in ordering that a verdict be entered for defendant Okano and against defendant Hawaiian Electric in respect to the latter's cross-claim against Okano for contribution.

ARGUMENT

The only relief sought by Hawaiian Electric against Okano in its cross-claim was for contribution, and this relief was prayed for only in the event it was determined that Hawaiian Electric and Okano were determined to have been joint tort-feasors. This claim for contribution was made under the Uniform Contribution among Tortfeasors Act which is in force in Hawaii, (Chapter 246, Part II, Revised Laws of Hawaii 1955).

Hawaiian Electric's prayer for relief against Okano was conditioned on its having been determined that the two were joint tort-feasors. No such determination

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had been made in the case when the court orally granted Okano's motion for a directed verdict in respect to the cross-claim on January 18, 1967, nor was such a determination ever made during the course of the trial. Furthermore, on January 20, 1967, the court granted the motion of Hawaiian Electric for a directed verdict in respect to the plaintiff's claim against it. Therefore, the question raised by Hawaiian Electric's cross-claim was moot on January 25, 1967, the day on which the trial court signed the order directing that a verdict be entered for Okano on the cross-claim. The question has continued to be moot and will continue to be moot unless this court reverses the trial court's order directing a verdict in favor of Hawaiian Electric in respect to the plaintiff's claim and unless upon a new trial of that claim a verdict is rendered in favor of the plaintiff and against Hawaiian Electric. Therefore, there has never been any occasion for the trial court to act in respect to Hawaiian Electric's cross-claim against Okano and the action of the trial court in purporting to pass upon a moot question should be reversed.

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CONCLUSION

If this court affirms the trial court's order directing a verdict in favor of Hawaiian Electric Company, Inc. in respect to the plaintiff's claim, then the question raised by Hawaiian Electric's claim against George Okano Electrical Service, Ltd. will continue to be moot and there will be no need for the court to pass upon the question raised by this cross-appeal.

If, however, this court orders a new trial of plaintiff's claim against Hawaiian Electric, then because the question raised by Hawaiian Electric's cross-appeal against George Okano Electrical Service, Ltd. was moot at the time the trial court signed its order of January 25, 1967, this court should reverse that order and direct that there be a new trial also of Hawaiian Electric's cross-claim against George Okano Electrical Service, Ltd.

DATED: Honolulu, Hawaii, August 23, 1967.

Respectfully submitted,



RICHARD E. STIFEL
Bank of Hawaii Building
Honolulu, Hawaii

Attorney for Hawaiian
Electric Company, Inc.

CHAPTER I

The first part of the book is devoted to a general survey of the subject. It begins with a definition of the term "philosophy" and then proceeds to a discussion of the various branches of the subject. The author then discusses the history of philosophy, from the ancient Greeks to the modern era. He then discusses the various methods of philosophy, such as logic, metaphysics, and ethics. The book then discusses the various schools of thought, such as Platonism, Aristotelianism, and Stoicism. The book then discusses the various problems of philosophy, such as the problem of knowledge, the problem of free will, and the problem of the soul. The book then discusses the various solutions to these problems, such as the theory of forms, the theory of the soul, and the theory of free will. The book then discusses the various applications of philosophy, such as the theory of the state, the theory of education, and the theory of law. The book then discusses the various contributions of philosophy to the other sciences, such as the theory of the mind, the theory of language, and the theory of society. The book then discusses the various contributions of philosophy to the arts, such as the theory of art, the theory of literature, and the theory of music. The book then discusses the various contributions of philosophy to the social sciences, such as the theory of economics, the theory of politics, and the theory of sociology. The book then discusses the various contributions of philosophy to the natural sciences, such as the theory of physics, the theory of chemistry, and the theory of biology. The book then discusses the various contributions of philosophy to the human sciences, such as the theory of psychology, the theory of anthropology, and the theory of history. The book then discusses the various contributions of philosophy to the life sciences, such as the theory of medicine, the theory of agriculture, and the theory of botany. The book then discusses the various contributions of philosophy to the earth sciences, such as the theory of geology, the theory of meteorology, and the theory of astronomy. The book then discusses the various contributions of philosophy to the social sciences, such as the theory of economics, the theory of politics, and the theory of sociology. The book then discusses the various contributions of philosophy to the natural sciences, such as the theory of physics, the theory of chemistry, and the theory of biology. The book then discusses the various contributions of philosophy to the human sciences, such as the theory of psychology, the theory of anthropology, and the theory of history. The book then discusses the various contributions of philosophy to the life sciences, such as the theory of medicine, the theory of agriculture, and the theory of botany. The book then discusses the various contributions of philosophy to the earth sciences, such as the theory of geology, the theory of meteorology, and the theory of astronomy.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard E. Stifel

RICHARD E. STIFEL



NO. 22051

IN THE UNITED STATES COURT OF APPEALS
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TERRANCE I. POSTON, a citizen
of Alaska,

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THE UNITED STATES OF AMERICA,
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Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF HAWAII IN CIVIL
NO. 2345

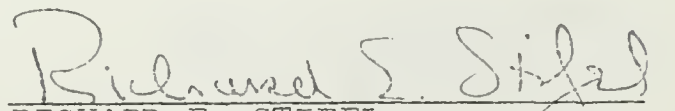
CERTIFICATE OF SERVICE

I hereby certify that a copy of the within
answering brief of defendant-appellee Hawaiian Electric
Company, Inc. was mailed on December 29, 1967, to the
following:

JOSEPH A. RYAN
119 Merchant Street
Honolulu, Hawaii
Attorney for Plaintiff-
Appellant

DENNIS E. W. O'CONNOR
333 Queen Street
Honolulu, Hawaii
Attorney for George Okano
Electrical Service, Ltd.

YOSHIMI HAYASHI
United States Attorney
Federal Building
Honolulu, Hawaii
Attorney for The United
States of America


RICHARD E. STIFEL
Bank of Hawaii Building
Honolulu, Hawaii
Attorney for Hawaiian Electric

